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No.

Office Supreme Court, U.S.

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In the
Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM O. RADSECK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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QUESTIONS PRESENTED

I. Whether the Seventh Circuit's approval of improperly admitted co-conspirator statements, thereby sanctioning the trial court's application of a *prima facie* standard of proof in the preliminary determination of the existence of the charged conspiracy, constituted a conflict with the law of other circuits and a substantial departure from the standards of evidence which should govern criminal trials in the Federal Courts?

II. Whether the Seventh Circuit's approval of jury instructions in a mail fraud case, which omit any instructions that specific intent is an element of the offenses, violates the due process clause of the Fifth Amendment and is thereby conflicting with the law of all other circuits and constituting a substantial departure from the procedure which should govern criminal trials in the Federal Courts?

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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Petitioner William O. Radseck respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 28, 1983.

OPINIONS BELOW

The District Court wrote no opinion on the issues submitted here. The Court of Appeals' opinion on the merits, rendered September 28, 1983, is not yet officially published and is reproduced herein at Appendix p. 1a, *et seq.*

JURISDICTION

Petitioner was convicted in the United States District Court for the Southern District of Indiana, Indianapolis Division. A timely appeal was taken to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291. The Court of Appeals issued its opinion on September 28, 1983. A petition for rehearing *en banc* was denied on December 6, 1983. Jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rule 17 of the Rules of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTION: Fifth Amendment
Sixth Amendment

FEDERAL RULES:

Fed. R. Evid. 80(d)(2)(E)

Fed. R. Evid. 104(a)

Each of the above is set Forth in the Appendix p.
21a *et. seq.*

STATEMENT OF THE CASE

William O. Radseck was convicted in the Southern District of Indiana on counts resulting from two indictments. The original indictment in this case was entered on October 21, 1981 and was in twelve counts. Count I alleged that between November, 1977 and December 6, 1977, Petitioner Radseck, Loren Rosander and Cosmo Peter Macri (unindicted co-conspirators herein) violated the Mail Fraud Act, 18 U.S.C. § 1341. Count 2 alleged that between May, 1976 and December 6, 1977, William O. Radseck, Loren Rosander and Cosmo Peter Macri (unindicted co-conspirators herein) committed conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371. Count 3 alleges that between January, 1977 and August

30, 1978, Petitioner Radseck and Paul Goodin, not a defendant herein, violated the Mail Fraud Act, 18 U.S.C. § 1341. Count 4 alleges that between January, 1977 and October 4, 1978, Petitioner Radseck and Paul Goodin, a co-conspirator but not a defendant herein, committed conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371. Count 5 alleges that Petitioner Radseck violated the Hobbs Act, 18 U.S.C. § 1951, on October 4, 1978 by extortion from Paul A. Goodin. Count 6 alleges that between April, 1978 and September 1, 1978, Petitioner Radseck, Larry D. Hiner and William B. Casassa, who are not defendants herein, violated the Mail Fraud Act, 18 U.S.C. § 1341. Count 7 alleges that on July 25, 1978, Petitioner Radseck, Larry D. Hiner and William B. Casassa, who are not defendants herein, violated the Mail Fraud Act, 18 U.S.C. § 1341. Count 8 alleges that on September 1, 1978, Petitioner Radseck, Larry D. Hiner and William B. Casassa, who are not defendants herein, violated the Mail Fraud Act, 18 U.S.C. § 1341. Count 9 alleges that between April, 1978 and September 1, 1978, Petitioner Radseck, Larry D. Hiner and William B. Casassa, co-conspirators but not defendants herein, committed conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371. Counts 10, 11 and 12 allege that, on July 19, 1978, July 28, 1978 and September 1, 1978, respectively, Petitioner Radseck extorted from Larry D. Hiner and William B. Casassa, the aforementioned unindicted co-conspirators but not defendants herein, in violation of the Hobbs Act 18 U.S.C. § 1951.

The second indictment was returned on February 5, 1982. Counts 1, 2 and 3 alleged that for calendar years 1977, 1978 and 1979, respectively, Petitioner Radseck

attempted income tax evasion in violation of 26 U.S.C. § 7201.

On August 17, 1982, the Court sentenced Petitioner Radseck to concurrent six year sentences on counts 5, 10, 11 and 12 and imposed an aggregate fine of \$5,000.00. On counts 4 and 9, the Court sentenced Radseck to concurrent two year sentences which are also concurrent with counts 5, 10, 11 and 12. On counts 3, 6, 7 and 8, the Court sentenced Radseck to concurrent two year sentences which are also concurrent with counts 5, 10, 11 and 12. On counts 1, 2 and 3 of the second indictment, the Court sentenced Radseck to concurrent two year sentences which are also concurrent with counts 5, 10, 11 and 12.

Petitioner Radseck appealed from this Judgment to the Court of Appeals for the Seventh Circuit. The appeal was argued May 10, 1983. Nearly five months later, the Seventh Circuit affirmed petitioner's conviction. After two months of deliberation, petitioner's motion for rehearing *en banc* was denied.

I. Facts Forming the Basis of the Conviction

The evidence at trial showed that Radseck was by occupation a casualty and property claims adjuster. His experience as a claims adjuster commenced in 1957 and continued through his employment with Milwaukee Mutual Insurance Company from 1965 to 1979. In 1971, he was promoted to claims manager for Indiana and was responsible for supervising the settlement of Indiana based claims.

Milwaukee Mutual Insurance Company issues property and casualty insurance in six states, including Indiana.

Prior to 1971, the adjustment and settlement of Indiana claims was supervised by the home office in Milwaukee, Wisconsin. In order to provide more prompt and efficient claims service, Radseck was promoted and directed to establish a claims office in Indianapolis.

The Indiana office was subject to an annual audit process. Radseck was cited by his employer and their agents for his high degree of professionalism. Further, he enjoyed the distinction of obtaining the highest honorary designation given in his profession, Chartered Property Casualty Underwriter. In 1979, Radseck resigned his position with Milwaukee Mutual Insurance Company to establish a private adjustment company.

In accord with Milwaukee Mutual Insurance Company policy requiring prompt and efficient claims service, Radseck maintained business contacts with various construction companies which were capable of providing repair service in the event that an insured suffered a sudden property damage loss.

In March or April, 1978, Radseck received a written letter and later a telephone call from Hiner of Round Construction Company, whereby he solicited insurance repair work. Round Construction Company was owned and operated by Hiner and Casassa.

Due to the need to have reliable contractors available upon short notice for repair work, Radseck agreed to meet with Hiner for lunch to discuss business. Radseck discussed Hiner's business background and received assurances from Hiner that Round Construction would provide prompt and efficient repair service. Radseck subsequently assigned property damage repairs to Round

Construction Company. Radseck firmly denies any agreement regarding a kickback or like arrangement.

Hiner's recollection of this 1978 meeting with Radseck differs significantly. Hiner maintains that Radseck offered to provide insurance repair work to Round Construction if he were provided a cash payment of 15% of the gross repair estimate.

Hiner testified that after this luncheon with Radseck, he discussed the proposal with his partner, Casassa and they decided to accept and subsequently received insurance repair assignments from Radseck.

When initially contacted by FBI agents, Hiner and Casassa denied making any cash payments to Radseck but changed their statement upon negotiating a plea arrangement whereby they pled guilty to one count of mail fraud in exchange for testimony against Radseck.

REASONS FOR GRANTING THE WRIT

A. THE SEVENTH CIRCUIT'S APPROVAL OF IMPROPERLY ADMITTED CO-CONSPIRATOR STATEMENTS BY SANCTIONING THE TRIAL COURT'S APPLICATION OF A PRIMA FACIE STANDARD OF PROOF IN THE PRELIMINARY DETERMINATION OF THE EXISTENCE OF THE CHARGED CONSPIRACY SQUARELY CONFLICTS WITH THE LAW OF OTHER CIRCUITS AND IS A SUBSTANTIAL DEPARTURE FROM THE STANDARDS OF EVIDENCE WHICH SHOULD GOVERN CRIMINAL TRIALS IN THE FEDERAL COURTS.

B. THE SEVENTH CIRCUIT'S APPROVAL OF JURY INSTRUCTIONS IN A MAIL FRAUD CASE WHICH OMIT ANY INSTRUCTION THAT SPECIFIC INTENT IS AN ELEMENT OF THE OFFENSES VIOLATES DUE PROCESS AND CLEARLY CONFLICTS WITH THE LAW OF ALL OTHER CIRCUITS AND IS A SUBSTANTIAL DEPARTURE FROM THE STANDARDS OF PROCEDURE WHICH SHOULD GOVERN CRIMINAL TRIALS IN THE FEDERAL COURTS.

This case presents issues of paramount importance concerning the standard of proof to be applied in the preliminary determination of a charged conspiracy and the minimum constitutional requirements for instructions in a mail fraud case. The importance of these issues is underlined by the plethora of conspiracy cases which have proliferated in recent years and which are often determined by the admission of co-conspirator statements.

As noted in the Statement of the Case, supra, the co-conspirator statements were crucial evidence against Radseck. Due to the proximate relationship of the various counts of the indictments, petitioner submits that the improperly admitted co-conspirator statements poisoned the evidence and resulted in prejudicial, reversible error regarding all counts of the indictments.

The plight of the alleged conspirator who claims to be not guilty in a case in which others clearly are guilty is sketched by Supreme Court Justice Jackson's separate opinion in *Krulewitch v. United States*, 336 U.S. 440, 454 (1949):

A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrong-doing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other.

This uneasy seat is complicated when certain members of the alleged conspiracy have entered into plea agreements which effectively result in their having a vested interest in the conviction of the other alleged conspirator, as noted in the Statement of the Case, supra, is the relationship between Hiner and Casassa (the co-conspirators offering the hearsay statements) and petitioner Radseck.

Petitioner's only protection lay in the enforcement of the requirements of the long-established rule governing the admissibility of statements which would be inadmis-

sible hearsay but for the fact that they are offered as "conspirator statements." Federal Rule of Evidence 801(d)(2)(E) provides that a statement that would otherwise be hearsay under Rule 801(c), and therefore inadmissible under Rule 802, may be admitted if it is made "by a conspirator of a party during the course and in furtherance of the conspiracy." The rule codifies the common law exception to the hearsay rule.

Although the rule on its face contains no indication that the trial judge must find evidence of a conspiracy sufficient to warrant a belief that the declarant who made the statements and the defendant against whom they are offered both were co-conspirators when the statements were made, the finding was required at common law, *Glasser v. United States*, 315 U.S. 60, 74-75 (1942) and every court of appeals continues to insist upon it. The Seventh Circuit recognized this in its opinion. (App. p. 3)

The courts of appeals have now developed an approach that requires the trial judge to determine that there is sufficient evidence of conspiracy to justify admission of conspirator statements. The majority of circuits requires the judge to decide by a preponderance of the independent evidence (i.e., the evidence independent of the conspirator statements offered by the government) that a conspiracy involving the declarant who made the statements and the defendant against whom the statements are offered was in existence when the statements were made and that the statements were in furtherance of the conspiracy. The Seventh Circuit had previously adopted the approach and reiterated its adherence to it in its opinion in this case. (App. p. 3)

The problem in this case arose because the trial judge failed to apply the proper standard. The trial court applied a *prima facie* standard of proof rather than the preponderance standard of proof. The trial court ruling is shown in the following excerpt of the record:

The Court is convinced certainly *to the extent of a prima facie case having been established*, that there was a conspiracy between the Defendant Radseck and the Defendant Hiner in the other case, not a defendant in this case, he is an unnamed alleged conspirator, that there was such conspiracy between them and that, therefore, the Court should allow the testimony to come into the record over the objection of the Defendant. (Tr. Vol. 4, p. 787 emphasis added)

The Seventh Circuit concludes that because the trial judge discussed *United States v. Santiago*, 582 F. 2d 1128 (7th Cir. 1978), that the trial judge understood and used the correct standard to evaluate the evidence of the conspiracy. Yet, a close examination of *United States v. Santiago*, *supra*, reveals that this holding by the Seventh Circuit in petitioner's case represents a significant enlargement of the conspirator exception, which unconstitutionally deviates from the principles of *U.S. v. Santiago*, *supra*, and the decisions of other courts of appeals. This issue will be more fully explored in our arguments below.

Further, the Seventh Circuit has approved jury instructions which nowhere articulated that specific intent to defraud is an essential element of the offense of mail fraud. The Seventh Circuit's acceptance of this erroneous charge creates a new, lower standard which sharply conflicts with the law of other circuits, and in effect nullifies the requirement that in a criminal case the jury, and the jury alone, must determine that the Government has

sustained its burden of proof as to "every fact necessary to constitute the crime." *In Re Winship*, 397 U.S. 358, 364 (1974); *Morisette v. United States*, 342 U.S. 246 (1952).

I. THE GUIDING CONSTITUTIONAL PRINCIPLES

This Court in *Glasser v. United States*, 315 U.S. 60 (1942) prohibited judges from considering the co-conspirator statements themselves when determining the availability of the co-conspirator hearsay exception to those statements. Under this holding, judges may only consider independent evidence of the conspiracy in determining the admissibility of out of court statements of co-conspirators. The rationale of this decision discussed the fact that use of hearsay in admissibility decisions creates the potential for bootstrapping, whereby a prosecutor could establish the prerequisite conspiracy by the very hearsay statement he seeks to admit.

The only Supreme Court decision which has discussed the standard of proof that the evidence of conspiracy must satisfy is *United States v. Nixon*, 418 U.S. 683 (1974). This Court stated in dictum that the prosecution must show: "As a preliminary matter, there must be a substantial, independent evidence of the conspiracy, at least enough to take the question to the jury." 418 U.S. 683, 701, Footnote 14.

It is against these essential constitutional principles that the ruling of the trial court and the decision by the Seventh Circuit must be measured with regard to the hearsay co-conspirator statements. They fall far short of these principles.

Further, this Court in *In Re Winship*, 397 U.S. 358 (1970), held in no uncertain terms that "the Due Process

Clause protects the accused against conviction *except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.*" 397 U.S. 358, 364 (emphasis added). This proof must be established to the satisfaction of the jury, not the trial court or appellate court; longstanding precedent prohibits directing a verdict as to any element of the offense in a criminal case. For:

In a jury trial, the primary Finders of Fact are the jurors. Their overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, *see Sparf & Hansen v. United States*, 156 U.S. 51, 105 (1895); *Carpenters v. United States*, 330 U.S. 395, 408 (1947), regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused.

United States v. Martin Linen Supply Co., 430 U.S. 564, 572-573 (1977).

Any instruction which has the effect of substantially reducing the Government's burden of proof is "fundamentally inconsistent" with the rights recognized in *In Re Winship*, *supra*. *Cool v. United States*, 409 U.S. 100, (1972) (per curiam). *Morissette v. United States*, 342 U.S. 246 (1952) and *Sandstrom v. Montana*, 442 U.S. 510 (1979) demonstrated the principle that to remove from the jury any issue as to an element of a criminal offense would "conflict with the overriding presumption of innocence with which the law endows the accused and

which extends to every element of the crime." 442 U.S. 510, 523.

As the Court stated in *Connecticut v. Johnson*, 51 U.S.L.W. 4175 (1983), "a conclusive presumption on the issue of intent is the functional equivalent of a directed verdict on that issue," 51 U.S.L.W. 41175, 4178. It is no less unconstitutional to effect the same result by not requiring the jury to expressly consider and determine, under appropriately clear instructions, each contested element of the offense. Thus, failure to charge the jury on an essential element has been held to impermissibly "eliminate the Government's burden of proof," *United States v. Benedetto*, 558 F. 2d 171, 177 (3rd Cir. 1977), citing *In Re Winship*.

Once again, it is against these inviolable constitutional principles that the jury instructions given by the trial court and approved by the Seventh Circuit must be measured. We maintain that their application in this case falls far short of the aforementioned constitutional principles.

II. THE SEVENTH CIRCUIT'S APPROVAL OF IMPROPERLY ADMITTED CO-CONSPIRATOR STATEMENTS BY SANCTIONING THE TRIAL COURT'S APPLICATION OF A PRIMA FACIE STANDARD OF PROOF IN THE PRELIMINARY DETERMINATION OF THE EXISTENCE OF THE CHARGED CONSPIRACY SQUARELY CONFLICTS WITH THE LAW OF OTHER CIRCUITS AND IS A SUBSTANTIAL DEPARTURE FROM THE STANDARDS OF EVIDENCE WHICH SHOULD GOVERN CRIMINAL TRIALS IN THE FEDERAL COURTS.

The nature and scope of the charged conspiracy was clearly and explicitly stated in the language of counts 2,

4 and 9 of the first indictment. Specifically, the indictment alleged a conspiracy to commit mail fraud. The alleged conspirators were Hiner and Casassa (unindicted conspirators) and petitioner Radseck. The co-conspirators hearsay statements were offered by the prosecution at a very early but crucial stage of the trial. These conspirator hearsay statements provided the foundation of the prosecution's case.

The substance of the conspirator hearsay statements were that Hiner stated to Casassa that Radseck proposed a kickback arrangement whereby Radseck would assign property repair claims to Hiner and Casassa and they would remit 15 percent of the total job's cost to Radseck in cash. Casassa's answer which constituted the hearsay conspirator statement's is provided at App. p. 23a.

As previously stated in the Reasons for Granting the Writ, *supra*, the trial judge permitted the introduction of this extremely damaging and prejudicial co-conspirator statement after improperly applying a *prima facie* standard of proof in the preliminary determination of the existence of the charged conspiracy. These improperly introduced statements constituted the foundation of the Government's case in both indictments and therefore, served to poison the jurors against petitioner's line of defense.

While proof of the existence of a conspiracy is not an expressed requirement, it may be implied since a court must necessarily find that a conspiracy existed before a declarant can qualify as a co-conspirator. In *United States v. Gil*, 604 F. 2d 546, 547 (7th Cir. 1979), the court stated: "The existence of a conspiracy is an obvious necessary precondition before the rule comes into play."

Prior to the enactment of the Federal Rules of Evidence, a prima facie case of conspiracy had to be shown before the statements of an alleged co-conspirator would be admissible *United States v. Cartwright*, 528 F. 2d 168, 171 (7th Cir. 1970). Subsequent decisions have illustrated and ruled that a higher standard of proof than prima facie is necessary. The need to carefully examine and establish preliminary evidentiary standards in conspiracy cases was addressed by this Court in *United States v. Nixon*, *supra*.

In *United States v. Petrozziello*, 548 F. 2d 20, 23 (1st Cir. 1977), the First Circuit examined the prima facie standard in light of Rule 104 and found that the new rule required a higher standard. The court held that the civil standard of preponderance of the evidence is the proper standard for future cases. This case indicated that the new higher standard was adopted for the following reasons; first, under Rule 104(a), the judge alone decides preliminary fact issues necessary to determine preliminary questions of admissibility; second, the new rule uses the word "determine" which imparts a higher standard of proof, since, "finding a prima facie case is not the same as determining that a conspiracy existed;" third, since under Rule 104(a) the Court may consider hearsay and other inadmissible evidence in making the determination on admissibility, a higher standard is required. Therefore, the rationale for the preponderance standard has been adopted by the vast majority of circuits.¹

¹ See: *United States v. James*, 576 F. 2d 1121, 1130 (5th Cir. 1978); *United States v. Enright*, 579 F. 2d 980, 983-84 (6th Cir. 1978); *United States v. Bell*, 573 F. 2d 1040, 1043 (8th Cir. 1978); *United States v. Petersen*, 611 F. 2d 1313, 1327 (10th Cir. 1979); *United States*

While the Seventh Circuit has adopted the preponderance standard, a close examination of *United States v. Santiago*, supra, reveals that the court's application of the preponderance standard in Radseck's case represents an unconstitutional enlargement of the co-conspirator exception. The Seventh Circuit held that the preliminary preponderance standard of the existence of a conspiracy could be determined from the independent testimony of federal agents that observed Santiago operating a motor vehicle which was, in effect, the movable command post for a series of negotiations and inferentially, at least, the situs of heroin. 582 F. 2d 1128, 1136.

In marked contrast, the Seventh Circuit held in petitioner Radseck's case that Hiner's testimony was sufficient to establish a conspiracy. This holding constitutes a significant enlargement of the co-conspirator exception because Hiner's meager, self-serving testimony (his testimony was provided in consideration for a plea agreement which resulted in probation) was very limited at this early stage of the trial. There were no other witnesses or exhibits upon which the preliminary determination was based. Certainly, there was no testimony comparable to that given by federal agents in *United States v. Santiago*, supra.

While the Seventh Circuit has adopted the preponderance standard, *United States v. Santiago*, supra, we submit that the Seventh Circuit's application of the hearsay

¹ (Continued)

v. Gantt, 617 F. 2d 831, 845-46 (D.C. Cir. 1980); *United States v. Torres*, 519 F. 2d 723 (2nd Cir. 1975); *United States v. Trowery*, 542 F. 2d 623, 627 (3rd Cir. 1976); *United States v. Jones*, 542 F. 2d 186, 203 (4th Cir. 1976); *United States v. Santiago*, 582 F. 2d 1128, 1132 (7th Cir. 1978).

exception has resulted in an unconstitutional enlargement of that exception and, therefore, is in direct conflict with the other circuits. Therefore, we implore this Court to grant this petition for a writ of certiorari and thereby clarify the inconsistencies in our Federal Circuit Court's application of the co-conspirator exception.

Although adoption of Rule 104(a) resolved the issue of who should arbitrate the admissibility of co-conspirator statements, Rule 104(a) created two new issues. These new issues concern the type of evidence the judge may consider in determining the application of Rule 801(d)(2)(E), and the appropriate standard of proof that prosecutors must satisfy before courts may admit co-conspirator statements into evidence. Since Rules 104(a) and 801(d)(2)(E) do not expressly resolve these questions, courts have had to determine whether the two rules' lack of mandate implicitly endorses existing case law or directs the adoption of new procedures. *United States v. James*, 590 F. 2d 575, 578-581 (5th Cir. 1979).

With respect to the issue of what types of evidence judges may consider in making the threshold conspiracy determination under Rule 104(a), circuit courts have had to decide whether judges may only consider independent nonhearsay evidence or whether judges may consider all proffered evidence, regardless of its hearsay nature. In the pre rule 104(a) decision of *Glasser v. United States*, supra, this Court prohibited judges from considering the co-conspirator statements themselves when determining the availability of the co-conspirator hearsay exception to those statements. Under the *Glasser* requirement, judges may only consider independent evidence of the conspiracy in determining the admissibility of out of court statements of co-conspirators.

Use of hearsay in admissibility decisions creates the potential for "bootstrapping," whereby the prosecutor conceivably could establish the prerequisite conspiracy by the hearsay statement he seeks to admit. With the exception of evidentiary rules regarding privileges, however, Rule 104(a) releases a judge from the strictures of the rules of evidence. *United States v. Santiago*, 582 F. 2d 1128, 1133 n. 11 (discussing conflict between Glasser and Rule 104(a)). Rule 104(a) seemingly permits judges to consider hearsay and other inadmissible evidence in making admissibility determinations under Rule 104(a). Therefore, Rule 104(a) arguably authorizes judges to do exactly what Glasser prohibited.

Circuit courts have reached varying results on the comparability of Glasser and Rule 104(a). The First and Eighth Circuits serve as analytical extremes. In *United States v. Martorano*, 557 F. 2d 1, 12 (1st Cir.), rehearing denied, 561 F. 2d 406 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978) the Court held that the judge may consider out of court statements that the prosecutor seeks to admit under Rule 801(d)(2)(E) in making the preliminary determination of whether the requisite 801(d)(2)(E) conspiracy exists. The Court observed that except for rules regarding privilege, the language of 104(a) expressly released judges from abiding rules of

² See *United States v. Maklin*, 573 F. 2d 1046, 1048 n.2 (8th Cir. 1978); "Bootstrapping" means that the prosecutor lays the foundation for the introduction of the co-conspirator statements by relying on the co-conspirator statements themselves as proof of the conspiracy. *United States v. DeFillipo*, 590 F. 2d 1228, 1236 (2d Cir.), *cert. denied*, 442 U.S. 920 (1979).

evidence when considering questions of competency.³ Furthermore, the Court reasoned that judges would recognize the inherent weaknesses in the hearsay statements. The First Circuit consequently reduced Glasser to a warning that hearsay statements ordinarily have questionable credibility.⁴ Conversely, the Eighth Circuit in *United States v. Macklin*, 573 F. 2d 1046, 1048 n.2 (8th Cir. 1978) held that bootstrapping is totally unwarranted and was not contemplated in the enactment of Rule 104(a).

A majority of circuits continue to adhere to Glasser's requirements that courts use only evidence independent of the co-conspirator's out-of-court statements in determining the application of Rule 801(d)(2)(E).⁵ How-

³ See *United States v. Matlock*, 415 U.S. 164, 175 (1973) (where judge determines admissibility, exclusionary rules aside from rules of privilege should not apply; judge should have power to receive evidence and give evidence such weight as his judgment and experience counsel); *United States v. James*, 590 F. 2d 575, 591-92, 592 n. 9 (5th Cir. 1979) (Tjoflat, J., concurring) (language of Rule 104(a) and Advisory Committee's Notes empower judge to consider proffered statements in determining admissibility of co-conspirator statements).

⁴ See 557 F.2d at 12; *United States v. Petrozziello*, 548 F. 2d at 23 n.2. The First Circuit subsequently endorsed *Martorano* in *United States v. Mackedon*, 562 F. 2d 103, 105 (1st Cir. 1977) (admissibility determination based on all the evidence). In *United States v. Nardi*, 633 F. 2d 972 (1st Cir. 1980), however, the court seemed to back away from the *Martorano* determination. *Id.* at 975. Without citing *Martorano* or Rule 104(a) the First Circuit concluded that the prosecution presented sufficient independent evidence to meet the preponderance standard. *Id.*

⁵ See *United States v. Cawley*, 630 F. 2d 1345, 1350 (9th Cir. 1980); *United States v. Troung Dinh Hung*, 629 F. 2d 908, 930 (4th Cir. 1980); *United States v. Rios*, 611 F. 2d 1135, 1340-41, 1341 n.8 (10th Cir. 1979), *cert. denied*, 101 S.C. 3054 (1981); *United States v. Tilton*,

ever, some circuit courts have endorsed Glasser's independent evidence requirement without specifically considering the impact of Rule 104(a).⁶

Rather than disregarding either Rule 104(a)'s language or Glasser's instructions, the Fifth Circuit in *United States v. James*, 576 F. 2d 1121 (5th Cir. 1978), rehearing in banc, 590 F. 2d 575, 581 (5th Cir.) *cert. denied*, 442 U.S. 917 (1979), integrated the two rules. The Court held that Rule 104(a) allows the trial judge to consider hearsay and other inadmissible evidence of conspiracy in determining the availability of Rule 801 (d)(2)(E). The Court concluded that Rule 104(a) did not mean to imply that a judge may consider the very

⁶ (Continued)

610 F. 2d 302, 306 (5th Cir. 1980); *United States v. Cambindo Valencia*, 609 F. 2d 603, 631 (2nd Cir. 1979), *cert. denied*, 446 U.S. 940 (1980); *United States v. McPartlin*, 595 F. 2d 1321, 1357 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); *United States v. Schoenhut*, 576 F. 2d 1010, 1027 (3rd Cir.) *cert. denied*, 439 U.S. 964 (1978); *United States v. Macklin*, 573 F. 2d 1045, 1048 n.2 (8th Cir. 1978); *United States v. Haldeman*, 559 F. 2d 31, 118, 118 n. 246 (D.C. Cir. 1976). The District of Columbia Circuit has not addressed the independent evidence issue since enactment of the rules. Therefore, although the court decided *Haldeman* before the rules become effective, *Haldeman* remains persuasive authority. See *United States v. Jackson*, 627 F. 2d 1198, 1216 n. 34 (D.C. Cir. 1980) (court held it was not necessary to decision in *Jackson* to determine effect of Federal Rules on *Glasser*).

⁷ See *United States v. Trowery*, 542 F. 2d 623, 626-27 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *United States v. Wood*, 550 F. 2d 435, 442 (9th Cir. 1977); *United States v. Stanchich*, 550 F. 2d 1294, 1299 n.4 (2nd Cir. 1977); *United States v. Stroupe*, 538 F. 2d 1063, 1065 (4th Cir. 1976).

out-of-court statements sought to be admitted under Rule 801(d)(2)(E). Rather, the judge may consider in determining the availability of 801(d)(2)(E) only those hearsay statements that differ from the out-of-court statements ultimately to be introduced at trial.

In addition to the courts' lack of consensus as to the type of evidence that the factfinder may use, the circuits are divided as to the quantum of proof that the prosecution must present before co-conspirator statements are admissible. This problem is the crux of the issue in petitioner's case because the trial court applied a prima facie standard of proof and the Seventh Circuit affirmed that decision.

Rule 104(a)'s insistence on a one-party determination of admissibility dictates a need to change the quantum of proof in such determinations.⁷ When the judge's determination is the only determination made, the prima facie standard used at common law fails to protect adequately. Accepting co-conspirator statements into evidence, following a mere prima facie showing, risks subjecting the accused to unreliable evidence. Moreover, continuing use of the prima facie standard without the jury applying additionally the beyond a reasonable doubt standard would broadly expand the scope of the co-conspirator exception.⁸

⁷ See *United States v. Enright*, 579 F. 2d 980, 985 (6th Cir. 1978) (framers of 104(a) did not intend for judge to employ prima facie test for resolving preliminary questions under that section).

⁸ *United States v. Petrozziello*, 548 F. 2d 20, 23 (1st Cir. 1977). The Supreme Court and various commentators have expressed concern about expanding the co-conspirator exception and emphasize the need to restrain the breadth of the exception. See *Krulewitch v. United*

All the circuits except one have abandoned the initial prima facie test and have adopted stricter standards.*

• (Continued)

States, 336 U.S. 440, 443-44 (1949); Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH.L. REV. 1159, 1170 (1954) (hereinafter cited as *Hearsay and Conspiracy*); Oakley, *From Hearsay to Eternity; Pendency and the Co-conspirator Exception in California—Fact, Fiction and a Novel Approach*, 16 SANTA CLARA L. REV. 1, 23 (1975). Over-expansion of the exception threatens the accused with confrontation of the prejudicial impact of unreliable evidence. See Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1384 (1972).

* See *United States v. Batimana*, 623 F. 2d 1366, 1368 (9th Cir. 1980), cert. denied, 449 U.S. 1038 (1980). The Ninth Circuit expressly has retained the prima facie standard. *United States v. Testa*, 548 F. 2d 847, 853 n.2 (9th Cir. 1977). The Ninth Circuit requires the prosecution to present sufficient, substantial evidence to establish a prima facie case of conspiracy and the defendant's involvement in the conspiracy before the co-conspirator exception applies. *United States v. Weiner*, 578 F. 2d 757, 768 (9th Cir. 1978), cert. denied, 439 U.S. 981 (1978); *United States v. Testa*, 548 F. 2d 847, 853 n.2 (9th Cir. 1977); *United States v. Calaway*, 524 F. 2d 609, 612 (9th Cir. 1975), cert. denied, 424 U.S. 967 (1976). The Ninth Circuit reasoned that the Supreme Court's sufficient, substantial evidence requirement in *United States v. Nixon*, 418 U.S. 683, 701 n.14 (1974) implied a prima facie showing. *United States v. Testa*, 548 F. 2d 847, 852-53 (9th Cir. 1977). See notes 112-122 and accompanying text *infra*. Since the *Nixon* Court relied exclusively on circuit court cases employing the prima facie standard, including two Ninth Circuit cases, to substantiate the Court's sufficient, substantial evidence requirement, the Ninth Circuit concluded that the Court's language required a prima facie showing. Id.

Eight circuits have modified their requisite standards of proof since Congress enacted the Federal Rules of Evidence.

The standards of proof used today include *prima facie*, preponderance, substantial independent evidence (*United States v. Jackson*) *supra*, and beyond a reasonable doubt. *United States v. Kahan* 572 F. 2d 923, 936 (2nd Cir. 1978) *cert. denied* 439 U.S. 833 (1978). The co-conspirator exception rules are silent on which standard of proof the evidence of conspiracy must satisfy. This Court in *Glasser* failed to designate the standard of proof *aliunde* (*Glasser v. U.S.*, 315 U.S. 74, 75 "Proof *Aliunde*" refers to the independent nonhearsay evidence necessary to constitute a threshold showing) necessary for admissibility. Likewise, this Court in *United States v. Nixon*, *supra*, failed to clarify the standard of proof *aliunde* when it stated in dictum that the prosecution must make a "sufficient showing, by independent evidence . . ." before co-conspirator statements are admissible. In an accompanying footnote, this Court stated that "as a preliminary matter, there must be substantial, independent evidence . . . to take the question to the jury." *United States v. Nixon*, *supra* p. 701 n.14.

Circuit courts have reacted to *U.S. v. Nixon*, *supra* in several ways. Some circuits have recited the Nixon substantial independent evidence language but have not adopted the dicta as a standard.¹⁰ Other circuits have equated the substantial independent evidence language

¹⁰ See, e.g. *United States v. Stroupe*, 538 F. 2d 1063, 1065 (4th Cir. 1976) (substantial independent evidence language is dictum); *United States v. Wiley*, 519 F. 2d 1348, 1350-51 (2d Cir. 1975) (substantial independent evidence language in Nixon is "pure dictum").

with the prima facie standard.¹¹ Only three circuits utilize the substantial independent evidence standard. The Fifth and Tenth Circuits use the substantial independent evidence standard but only when the court admits co-conspirator statements conditionally. *United States v. Grassi*, 616 F. 2d 1294, 1300-01 (5th Cir. 1980), *United States v. Petersen*, 611 F. 2d 1313, 1330-31 (10th Cir. 1970). Absent conditionally admitted co-conspirator statements, the District of Columbia, *United States v. Gantt*, 617 F. 2d 831, 844-45 n.6 (D.C. Cir. 1980) like seven other circuits, (see supra footnote 9) determine admissibility in a one step judicial determination based on a preponderance of the evidence.

While none of the circuit courts expressly require the prosecution to satisfy the reasonable doubt standard, judges in some jurisdictions have resubmitted the question of admissibility to the jury.¹² When the judge instructs the jury to make the ultimate admissibility standard, the jury employs the reasonable doubt standard.

¹¹ See, e.g. *United States v. Dixon*, 562 F. 2d 1138, 1141 (9th Cir. 1977), *cert. denied*, 435 U.S. 927 (1978) (substantial independent evidence means enough evidence to make prima facie case); *United States v. Stroupe*, 538 F. 2d 1063, 1065 (4th Cir. 1976) (Fourth Circuit has expressed substantial independent evidence language before in terms of prima facie proof of conspiracy but also in terms of proof by fair preponderance of independent evidence).

¹² See *United States v. Kahan*, 572 F. 2d 923, 936 (2d Cir. 1978), *cert. denied*, 439 U.S. 833 (1978); *United States v. Mitchell*, 556 F. 2d 371, 377 (6th Cir.), *cert. denied*, 434 U.S. 924 (1977); *United States v. King*, 552 F. 2d 833, 849 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1978).

Dennis v. United States, 346 F. 2d 10, 16 (10th Cir. 1965) rev'd on other grounds 384 U.S. 855 (1966).

Clearly, the district court applied the improper prima facie standard of conspiracy in petitioner's case. Likewise, the Seventh Circuit improperly applied the preponderance standard in affirming the district court's ruling. We submit that these erroneous decisions have resulted from the confused and inconsistent application of the co-conspirator exception within our Federal Circuit Courts. Nearly ten years have elapsed since this Court last addressed this issue by means of dictum in *United States v. Nixon*, supra. In view of the magnitude of conspiracy cases today and the significant impact which the co-conspirator exception has upon the constitutional rights of such defendants, the issues in petitioner's case are both special and extremely important and therefore, warrant full consideration by this Court.

III. THE FAILURE TO INSTRUCT THAT SPECIFIC INTENT TO DEFRAUD IS AN ESSENTIAL ELEMENT OF THE OFFENSE.

In this mail fraud case, where the major contested issue involved petitioner's knowledge and intent, the trial court's charge was fatally defective in failing to instruct that "intent to defraud" is an essential element in that the Government must prove that element beyond a reasonable doubt in order for the jury to convict.

In reality, the Seventh Circuit simply created a new standard for the district courts, one which would permit convictions in a mail fraud case where the jury was never informed of the specific intent to defraud requirement. All other circuits have uniformly held that a defendant is entitled to have the jury instructed, in

clear and concise language, as to all the elements of the offense which he is charged.¹³

Especially when omitted instructions relate to the essential element of knowledge and intent, as distinguished from other, more technical, requirements, the omission has been characterized as virtually *per se* plain error; the defendant is always prejudiced by the omission. *United States v. Brown*, 616 F. 2d 844; Fn. 7 (5th Cir. 1980)¹⁴

¹³ It has hitherto been universally recognized that failure "to charge an element of the offense is 'plain error' (see Rule 52(b)) requiring reversal even if the point was not raised below." *United States v. Rybicki*, 403 F. 2d 599, 603 (6th Cir. 1968); see e.g., *United States v. Small*, 472 F. 2d 818, 820 (3d Cir. 1972) ("plain error was committed in the failure of the court to instruct on all necessary elements of the crime of conspiracy"); *United States v. Williams*, 463 F. 2d 958, 962 (D.C. Cir. 1972) ("any omission of an element of a crime in the instructions to the jury is plain error under Rule 52 (b)"); *United States v. Hutchison*, 338 F. 2d 991 (4th Cir. 1964) ("This court cannot and will not affirm a conviction by a jury unless the District Court instructs as to the elements of the offense charged in the information or indictment, whether requested or not.") *United States v. Massiah*, 307 F. 2d 62, 71 (2d Cir. 1962), *rev'd on other grounds*, 377 U.S. 201 (1964) ("the defendant is entitled to have the jury instructed on all the elements that must be proved to establish the crime charged.").

¹⁴ In *United States v. Brown*, 616 F. 2d 844, 847 n.7 (5th Cir. 1980), the court noted that "the cases evidence . . . nearly a *per se* plain error standard in situations in which the failure of the court to instruct concerns an element of the crime relating to knowledge or intent." See, *United States v. Pope*, 561 F. 2d 663, 671 (6th Cir. 1977); *Vaccaro v. United States*, 461 F. 2d 626, 638 (5th Cir. 1972); *United States v. De Marco*, 488 F. 2d 828, 832 (2d Cir. 1973); *United States v. Small*, 472 F. 2d 818, 819 (3d Cir. 1972); *United States v. Thomas*, 459 F. 2d 1172, 1177 (D.C. Cir. 1972).

The critical importance of the intent to defraud element has been highlighted in other cases. In *United States v. Meadows*, 598 F. 2d 984 (5th Cir. 1979), the court reversed a mail fraud conviction because the jury instructions at a critical juncture did not repeat language reminding the jury of the intent required to convict, despite the fact that a completely adequate definition occurred in the instructions only two sentences earlier. The court characterized the omission as "poison (ing) the otherwise healthy charge."

(T)he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts. Although we realize, of course, that all instructions must be considered as a whole, and not word-by-word or phrase-by-phrase, such a fundamental understatement as to the paramount issue at a critical stage of the instruction requires reversal.

598 F.2d at 987-988. By contrast, that same court upheld a similar instruction concerning material omissions and halftruths, calling it "dispositive" that the trial judge had added the "four critical words . . . 'With intent to defraud'." *United States v. Martino*, 648 F. 2d 367, 393 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982). The jury was not asked to determine whether Radseek acted with intent to defraud, nor was it instructed to consider whether the conduct alleged in the indictment or proved at trial constituted a scheme to defraud.

Other circuits have expressly ruled that a definition of an element of the offense cannot substitute for an instruction that the Government must prove that very element beyond a reasonable doubt. In *United States v. Brooksby*, 668 F. 2d 1102 (9th Cir. 1982), the trial court

had correctly stated the law by reading the indictment and the statute and defining the word "willfully," but incorrectly listed only three of the elements that would be necessary to be proven beyond a reasonable doubt in order to convict the defendant. "(T)he failure to instruct (the jury) that willfulness was an essential element of the crime prejudiced the defendant. The steps already mentioned . . . did not cure the error." 668 F. 2d at 1105. The court reversed the conviction. So, too, in *United States v. Byrd*, 352 F. 2d 570, 572 (2d Cir. 1965) the court reversed a conviction where the trial court's charge had defined criminal intent but "omitted any instruction that criminal intent was an element which the Government, to convict, was required to prove beyond a reasonable doubt." The court characterized this as "tantamount to no instruction at all on the subject." *United States v. Byrd*, *supra* at 572, 574. See also, *United States v. Meadows*, *supra*.

The Seventh Circuit stands alone in expanding the concept of "reading the instructions as a whole" to totally exviscerate the requirement that the jury instructions contain a clear and concise statement of each essential element which the Government must prove beyond a reasonable doubt. The proper standard has been succinctly stated in *United States v. Pope*, 561 F. 2d 663, *supra*.

In determining the propriety of a jury instruction, the instruction must be viewed in its entirety, and *a misstatement in one part of the charge does not require reversal if elsewhere in the instruction the correct information is conveyed to the jury in a clear and concise manner* so that it is unlikely that an erroneous impression would remain in the minds of the jurors . . . (but) . . . (t)he failure to in-

struct on an essential element of the offense is "fundamental error" . . . (citation omitted), which cannot be cured by reference to the indictment or by reading the unexplained language of the statute to the jury. 561 F. 2d at 670-671. (Emphasis added.)

In Radseck's case, a clear and concise instruction, that intent to defraud was an essential element, did not exist at any point in the charge. The danger inherent in asking a jury to derive a correct statement of an essential element from various fragments in the court's instructions is made quite plain when one focuses on the prejudice caused to this petitioner by the court's phrasing. The trial court told the jury to convict if they found that Radseck had "*intentionally* participated in a scheme to procure money from Milwaukee Mutual by means of false pretenses or representations that were *calculated to deceive*." But, in the mail fraud context, "calculated to deceive" is not the equivalent of "intent to defraud."¹⁵

¹⁵ Despite the panel's emphasis, "calculated to deceive" does not translate into "intent to defraud." It is in part *because* not every deceit, false statement, or breach of fiduciary obligation gives rise to or works a criminal fraud that the "intent to defraud" element is essential. See, e.g., *United States v. Bethea*, 672 F. 2d 407 (5th Cir. 1982); see also, *United States v. McNeive*, 536 F. 2d 1245 (8th Cir. 1976). In order to prove a mail or wire fraud violation, the government must show that the scheme was devised with the specific intent to defraud. E.g., *United States v. Foshee*, 569 F. 2d 401 (5th Cir. 1978), *cert. denied*, 444 U.S. 1082 (1980); *United States v. Brown*, 540 F. 2d 364 (8th Cir. 1976). The specific intent requirement is used to distinguish between actual fraud, which involves an intent to deceive where some risk of harm to the victim is contemplated, and constructive fraud, which involves a mere breach of a fiduciary or equitable duty where no harm is con-

To permit this conviction to stand, on the basis of the Seventh Circuit's opinion in this case, would sanction an injustice to this petitioner and leave the district judges in every circuit in doubt as to the required instructions in mail fraud cases and the proper standard of proof in the preliminary determination of the existence of a charged conspiracy.

CONCLUSION

For the reasons stated herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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¹⁸ (Continued)

templated. *United States v. Bethea, supra*; see *Epstein v. United States*, 174 F. 2d 754, 765-766 (6th Cir. 1949).

Moreover, the deceit that forms the basis of the fraud must go to the nature of the bargain. *United States v. Regent Office Supply Co.*, 421 F. 2d 1174, 1182 (2d Cir. 1970). Any nondisclosures or affirmative misrepresentations must be material, that is, some harm to the victim of the fraud at least must be contemplated. *United States v. Bethea, supra*; *United States v. Ballard*, 663 F. 2d 534, 540-42 (5th Cir. 1981); *United States v. Bronston*, 658 F. 2d 920, 927 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *United States v. Rabbitt*, 583 F. 2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *United States v. Dixon*, 536 F. 2d 1388, 1399 n. 11 (2d Cir. 1976).

APPENDIX A

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 82-2390

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM O. RADSECK,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.

Nos. 82 CR 9 & 81 CR 96

William E. Steckler, *Judge*

ARGUED MAY 10, 1983—DECIDED SEPTEMBER 28, 1983

Before ESCHBACH and COFFEY, *Circuit Judges*, and
CAMPBELL, *Senior District Judge*.*

ESCHBACH, *Circuit Judge*. Appellant William O. Radseck was charged with five counts of mail fraud, 18 U.S.C. § 1341, three counts of conspiracy to commit mail fraud, 18 U.S.C. § 371, four counts of affecting interstate commerce by extortion, 18 U.S.C. § 1951, and three counts of attempted income tax evasion, 26 U.S.C. § 7201. After a jury trial, he was acquitted of two of

* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, sitting by designation.

the mail fraud charges, and convicted of the rest of the charges. Radseck was fined \$5,000 and sentenced to four six-year sentences for his extortion convictions, and nine two-year sentences for his other convictions. All sentences are to run concurrently. He takes this appeal pursuant to 28 U.S.C. § 1291. The appellant claims as error the admission of hearsay testimony of a co-conspirator, the admission of testimony concerning earlier fraud attempts, and the admission of certain government exhibits concerning the tax evasion charges.

For the reasons given below, we find no merit to these claims and affirm the convictions.

I.

A. The Co-conspirator Testimony

Radseck was the Indiana claims manager for the Milwaukee Mutual Insurance Company ("Milwaukee Mutual"). In 1978, Radseck met with Larry Hiner, a partner in the Round Construction Company ("Round"), and promised Hiner insurance work in exchange for a fifteen-percent kickback of the gross amount realized on Milwaukee Mutual work. After discussing the proposal with his partner, William Casassa, Hiner agreed to pay the kickbacks and Round began receiving work from Radseck. Hiner and Casassa continued their arrangement with Radseck until March 1979. Both Hiner and Casassa testified for the government as unindicted co-conspirators.

Hiner testified extensively about the kickback arrangement between Round and Radseck. The government then called Casassa, who testified that Hiner had related to him the details of Radseck's original proposal. Casassa's testimony concerning those initial discussions, to which he was not a party, was admitted pursuant to Fed. R. Evid. 801(d)(2)(E), the co-conspirator exception to the hearsay rule. "A statement is admissible under this rule only when the government has established by a preponderance of the evidence, independent of the statement

itself, that (1) a conspiracy existed, (2) that the defendants and the declarant were members of the conspiracy, and (3) that, the statement was made in the course of the conspiracy." *United States v. Xheka*, 704 F.2d 974, 985 (7th Cir. 1983); *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978). The preliminary determination that the government has in fact established a conspiracy is made by the trial judge pursuant to Fed. R. Evid. 104(a). *Santiago, supra*, 582 F.2d at 1130-31, 1133.

The admission of Casassa's testimony was preceded by an extended colloquy between the court and the attorneys for both sides. The discussion, which covers twelve pages of the trial transcript, concerns the requirements of *Santiago*, and the testimony already in evidence that could support an independent finding of conspiracy. All the parties to this discussion correctly identified the burden of proof applicable to the preliminary conspiracy determination as a showing by the preponderance of the evidence. In response to the objection to the hearsay testimony, the trial judge stated, "The Court must determine if by a preponderance of the evidence the declarant and the Defendant were members of a conspiracy when the hearsay statement was made and that the statement was in furtherance of the conspiracy." More discussion followed, during which both attorneys also referred to the preponderance-of-the-evidence standard. However, in deciding to admit the testimony, the trial judge concluded that he was "convinced certainly to the extent of a prima facie case having been established, that there was a conspiracy" The appellant now complains of this isolated reference to a prima facie standard.

Because the trial judge discussed *Santiago* at length, and because the judge and the attorneys referred to the preponderance-of-the-evidence standard at all times except this one instance, we are convinced that the trial judge understood and used the correct standard to evaluate the evidence of a conspiracy. Hiner's testimony is sufficient to establish a conspiracy, and although the appellant at-

tacks Hiner's credibility, we must defer to the trial judge's decision crediting Hiner's testimony.

B. Prior Similar Acts

The government introduced evidence that Radseck had also attempted to make a percentage kickback deal with Vernon Ayers, an insurance adjuster. Radseck approached Ayers in 1971, 1972, and again in 1976 with proposals similar to the one he offered Round Construction. The last proposal was made in the presence of Ted Biberstine, Ayers' employee. Both Ayers and Biberstine testified for the government. The appellant contends that the admission of their testimony was erroneous, because the testimony concerned acts that were both dissimilar to, and remote in time from, the conspiracies charged.

Under Fed. R. Evid. 404(b), "evidence of prior similar crimes or acts [is] admissible if such acts have a 'substantial relevance' to an issue other than a general criminal character and propensity to commit crime." *United States v. O'Brien*, 618 F.2d 1234, 1238 (7th Cir.), *cert. denied*, 449 U.S. 858 (1980); *United States v. McPartlin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979). Evidence of other crimes or misconduct is relevant if it bears upon intent, knowledge, or absence of mistake or accident. *United States v. Peskin*, 527 F.2d 71 (7th Cir.), *cert. denied*, 429 U.S. 818 (1975); *United States v. Jones*, 438 F.2d 461 (7th Cir. 1971). Here, the testimony of Ayers and Biberstine was admitted solely for the purpose of showing intent and plan, and the jury was so instructed. Where such evidence is introduced to show intent, "the degree of similarity is relevant only insofar as the acts are sufficiently alike to support an inference of criminal intent." *United States v. O'Brien*, *supra*, 618 F.2d at 1238; *United States v. Weiler*, 385 F.2d 63 (3d Cir. 1967). The testimony of Ayers, corroborated by Biberstine, was that Radseck had solicited kickbacks in return for the receipt of Milwaukee Mutual's business. With Ayers, as with others Radseck solicited, Radseck also spoke of cheating

the insurance company by inflating bills. These similarities are enough to support admissibility on the issue of intent. The prior acts need not be duplicates of the ones for which the defendant is now being tried. *United States v. O'Brien*, 618 F.2d 1234 (7th Cir.), *cert. denied*, 449 U.S. 858 (1980); *United States v. McPartlin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979).

Further, we do not agree that the acts testified to by Ayers and Biberstine were too temporally remote to be admissible. Radseck, whose solicitations of Ayers ended in 1976, was charged with conspiracies that began in 1976 and 1977. In *United States v. Lea*, 618 F.2d 426 (7th Cir.), *cert. denied*, 449 U.S. 823 (1980), we held admissible testimony that implicated the defendant in a kickback scheme that had occurred some ten to twelve years earlier than the one for which he was then on trial. *See also O'Brien, supra*, 618 F.2d 1234 (events testified to occurred two years earlier); *McPartlin, supra*, 595 F.2d 1321 (events testified to occurred four years prior to those charged). In the instant case, the solicitations of Ayers ended in the very year a conspiracy with one Loren Rosander, an insurance adjuster, began. We therefore hold that the admission of the prior-acts testimony of Ayers and Biberstine was not erroneous.

C. The Tax Exhibits

In its presentation of the attempted income tax evasion charges, the government relied on several exhibits which it offered in connection with the testimony of an Internal Revenue Service Agent, Arthur Young. The exhibits consisted of summaries of the evidence by which the government had concluded that Radseck had unpaid tax liabilities for the years 1977, 1978, and 1979, and computations by Agent Young using the "expenditures" method of income reconstruction—an accounting method. These exhibits purported to show how the government arrived at its conclusion that Radseck had attempted to evade payment of his taxes.

The exhibits used in this case are a hybrid form of evidence. On the one hand, they are comprised in part of the kind of tabulations contemplated by Fed. R. Evid. 1006, as when they summarize numerous independent financial transactions already in evidence through previous testimony and other exhibits. On the other hand, they are accompanied by the testimony of an expert, an agent of the Internal Revenue Service, who has prepared the exhibits and drawn certain conclusions, through the use of one or several income reconstruction methods, about the defendant's liability for unreported income.

We have approved the use of exhibits such as the ones admitted here where the government witness who prepared the exhibit was available for cross-examination, and the jury was instructed that the exhibits have no independent evidentiary weight and are to be disregarded insofar as they do not comport with other evidence. *United States v. Esser*, 520 F.2d 213 (7th Cir.), *cert. denied*, 426 U.S. 947 (1975); *United States v. Dana*, 457 F.2d 205 (7th Cir. 1972); *United States v. Tolbert*, 406 F.2d 81 (7th Cir. 1969); *United States v. Bernard*, 287 F.2d 715 (7th Cir. 1961); *United States v. Doyle*, 234 F.2d 788 (7th Cir. 1956.) We have also required that the exhibits be organized so the jury might easily correlate the parts that purport to be summaries with the evidence underlying those summaries. *Dana, supra*, 457 F.2d at 208; *Tolbert, supra*, 406 F.2d at 85.

Notwithstanding these requirements, the appellant states that the government's "expenditures" exhibits should not have been admitted. First, he claims the exhibits were inaccurate because they did not incorporate certain evidence, available to the government through its other exhibits and files, that would have negated some of the claimed tax liability. Second, he claims the exhibits were conclusory because they reflect the assumption that Radseck had no cash on hand, a fact which the appellant contends was not in evidence. We will discuss these concerns *seriatim*.

In the "expenditures" method of income reconstruction, IRS agents attempt to match the defendant's available sources of funds (salary, sales of assets, etc.) with expenditures and savings during a fiscal year. If expenditures and savings grossly exceed funds, agents conclude that the defendant had available unreported sources of income. During cross-examination of Agent Young, it was established that the government should have credited Radseck with income from a \$250 inheritance and a \$2,356 tax refund in 1977, a \$1,700 tax refund in 1978, and a \$6,000 return from the sale of a boat in 1979. It was also disclosed that the 1978 exhibit incorrectly included \$2,766 as both a personal expenditure and an increase in assets.¹ The appellant's contention that these inaccuracies rendered the exhibits inadmissible, however, reveals a misapprehension of our requirements. While some courts have specified that the trial judge conduct a hearing to determine the accuracy of the exhibits, *see, e.g., United States v. Conlin*, 551 F.2d 534 (2d Cir.), *cert. denied*, 434 U.S. 831 (1977), we require only that the defendant be allowed to thoroughly test the exhibits through cross-examination of the witness who prepared them, and that the jury be instructed as to their proper use. These requirements are checks against the prejudicial use of erroneous summary charts.² In the instant case, the trial

¹ The appellant's most serious contention, that a \$48,000 return from the sale of two rental properties (which would have reduced his tax liability for 1978 to zero) was not reflected in the government's computations, is not supported by the record. Agent Young testified on redirect that the money from the sale of those properties was included on lines twenty-four and twenty-six of the 1978 exhibit.

² We note that this is not a case where exhibits, properly introduced, are subsequently disclosed to be seriously inaccurate or where the government willfully introduced exhibits it knew presented a distorted picture of the defendant's financial situation. Agent Young testified that

court was advised before the exhibits were admitted that they were based on evidence already before the jury. All of the inaccuracies of which the appellant complains were disclosed during the extensive cross-examination of Agent Young, and acceded to by the government in its closing argument. Further, the jury was repeatedly cautioned by the court that a summary "does not constitute evidence," that "it is for the jury to determine whether the evidence supports the summary," and that the exhibits were "admitted to assist [the jury] in evaluating the other evidence." The admission of exhibits containing summaries under these circumstances complies with the decisions of this court, and we find no error.³

Finally, the appellant states the exhibits were inadmissible because they contained assumptions by Agent Young that rendered the exhibits conclusory. Specifically, he complains that the assumption that he had no increase in cash on hand, reflected in line one of each of the exhibits in question, was not based on facts in evidence. Radseck and his wife both testified that they had accumulated, through savings over the years, a large amount of cash in a dresser drawer in their home.

² (Continued)

the errors in the expenditures exhibits in no way affected the accuracy of the other summaries which were the government's primary method of proof, nor did the failure to include certain sums change his conclusion that, even by the expenditures method, Radseck owed unpaid taxes for the years in question. Finally, the government made no attempt to conceal the errors, and referred to them in its closing argument to the jury.

³ While it might have been better as a procedural matter if the lines on the exhibits were more clearly correlated with the underlying evidence, *see United States v. Dana*, 457 F.2d 205, 208 (7th Cir. 1972), we feel that the sources for the computations that appeared in the exhibits were well enough explored that the jury could not have been misled.

We note initially that the zero figure under "increase in cash on hand" is actually helpful to the appellant. Under the "expenditures" method, increases in assets are added to personal expenditures. The total is then compared with the defendant's source of funds. It is, therefore, helpful to a defendant if the figures in the "increase in assets" section is low, in order that all increases, coupled with expenditures, do not exceed the defendant's source of funds. We will assume, therefore, that the appellant's real objection is to line eighteen, entitled "decreases in cash on hand," which also shows a zero figure.

Agent Young testified that his conclusion that Radseck had no increase in cash on hand (and therefore no decrease was shown) was based on "all the evidence and oral testimony and from the exhibits from the trial." Further, Special Agent Clelland, who supervised the preparation of the exhibits, testified that in his experience in investigating thirty-five to forty attempted income tax evasion cases, people who have five bank accounts, thirteen savings and loan accounts and two brokerage accounts do not keep substantial amounts of cash on hand. The inference that Radseck did not keep such cash in his home was a permissible one. Agent Young's and Agent Clelland's qualifications to draw conclusions based upon the evidence were amply established at trial and are not questioned here. As we have noted before, "[t]he nature of a summary witness's testimony requires that he draw conclusions based upon the evidence presented at trial." *United States v. Esser*, 520 F.2d 213, 218 (7th Cir.), *cert. denied*, 426 U.S. 947 (1975).

That Radseck later testified he kept large amounts of cash in his home is of no import in the context of whether the exhibits were admissible. The government was under no obligation to include the appellant's version of the facts in its exhibits. *Myers v. United States*, 356 F.2d 469 (5th Cir.), *cert. denied*, 366 U.S. 961 (1966); *United States v. Shavin*, 320 F.2d 308 (7th Cir. 1963); *Flemister v. United*

States, 260 F.2d 513 (5th Cir. 1958). The jury was admonished by the court that the exhibits purported to be only "the Government's submission of the Government's theory of what the Government's case shows up to this point." The proper weight to be accorded the conclusions of the IRS agents was a question for the jury to decide.

For the reasons set forth above, the appellant's convictions are affirmed.

A true Copy:

Teste:

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*Clerk of the United States Court of
Appeals for the Seventh Circuit*

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 82-2390

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

WILLIAM O. RADSECK,

Defendant-Appellant.

On Appeal From The United States District Court For
The Southern District Of Indiana, Indianapolis Division

Hon. WILLIAM E. STECKLER, *Judge*

PETITION ON BEHALF OF APPELLANT
WILLIAM O. RADSECK FOR REHEARING
AND SUGGESTION FOR REHEARING IN BANC

On September 28, 1983, a panel of this Court (Eschbach and Coffey, Circuit Judges, and Campbell, Senior District Judge for the Northern District of Illinois, sitting by designation) affirmed Radseck's conviction on conspiracy to commit mail fraud, mail fraud, extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 and attempted income tax evasion charges. The charges were based on an alleged scheme whereby Radseck allegedly assigned property damage repairs to co-conspirators but not defendants herein, (Hiner, Cassassa and Goodin)

upon the alleged condition that Radseck receive 15% of the gross repair estimate. The panel's affirmance of the trial court's admission of the testimony and exhibits offered by Ayers and Biberstine regarding Mr. Radseck's prior acts in 1971 and 1972 will not be reargued here.

In this petition, Radseck raises three issues, the importance of which warrant consideration by the full Court in order to secure and maintain uniformity of decisions in this circuit. Those issues relate to the admission of a hearsay statement of a co-conspirator by improperly applying a *prima facie* standard of proof, the admission of inaccurate and conclusionary written summaries of Radseck's purported source and application of funds to prove attempted tax evasion and a new issue, which constitutes plain error and is, therefore, properly addressed at this juncture, namely, erroneous instructions of critical elements of mail fraud law, which depart in fundamental ways both from the Circuit's approved *LaBuy* Pattern Jury Instructions and from requirements repeatedly spelled out in prior decisions in this and other Circuits.

ARGUMENT

I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THE ADMISSION OF A CO-CONSPIRATOR STATEMENT BY IMPROPERLY APPLYING A PRIMA FACIE STANDARD OF PROOF IN THE PRELIMINARY DETERMINATION OF THE EXISTENCE OF THE CHARGED CONSPIRACY.

The panel opinion holds that the trial judge understood and used the correct standard to evaluate the evidence of a conspiracy. We submit that the holding in this case conflicts with the decision of this Court in *United States v. Santiago*, 582 F. 2d 1128 (7th Cir. 1978) and is also of exceptional importance since the holding represents a significant enlargement of the co-conspirator exception to the hearsay rule embodied in F.R. Evid. Section 801(d)(2)(E).

This Circuit has long recognized, as the panel opinion acknowledges, that the proper standard regarding the co-conspirator exception is the preponderance of the evidence standard. Slip op. at p. 3. Yet, the record clearly indicates that the trial judge concluded that he was "convinced certainly to the extent of a *prima facie* case having been established, that there was a conspiracy" (Tr. Vol. 4, p. 787)

The panel opinion concludes that because the trial judge discussed *United States v. Santiago*, supra, at length, that the trial judge understood and used the correct standard to evaluate the evidence of a conspiracy. Yet, a close examination of *United States v. Santiago*, supra, reveals that this holding represents a significant enlargement of the co-conspirator exception.

In *United States v. Santiago*, supra, this Court held that the preliminary preponderance standard of the

existence of a conspiracy could be determined from the independent testimony of federal agents that they observed Santiago operating a motor vehicle which was, in effect, the movable command post for a series of negotiations and inferentially, at least, the situs of heroin. (*U.S. v. Santiago*, 582 F. 2d 1128, 1136)

In pointed contrast, the panel opinion held that Hiner's testimony was sufficient to establish a conspiracy. This holding constitutes a significant enlargement of the co-conspirator exception because Hiner's meager, self-serving testimony (his testimony was provided in consideration for a plea arrangement which resulted in probation) was very limited at this early part of the trial. There were no other witnesses upon which the preliminary determination was based. Certainly, there was no testimony by federal agents of observations or conversations of the appellant, as was the case in *United States v. Santiago*, supra.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING INACCURATE AND CONCLUSIONARY WRITTEN SUMMARIES OF MR. RADSECK'S PURPORTED SOURCE AND APPLICATION OF FUNDS AS OFFERED IN EXHIBITS, GX 802, 803 & 804.

The panel recognizes "that it might have been better as a procedural matter if the lines on the exhibits were more clearly correlated with the underlying evidence . . ." See Slip op. p. 8. While it must be recognized that these exhibits were explored, we submit that the exhibits contained such numerous serious inaccuracies and conclusions of items not in evidence, that their introduction unduly prejudiced the appellant's position with the jury.

We maintain that the errors which Agent Young testified to totaled \$64,825.64 and that the effect upon line 40 of these exhibits, entitled "OMITTED TAX TABLE

INCOME" would be to more than offset the alleged net omitted tax table income of \$53,668.51. (TR Vol. p. 1988, 1989, 1993, 1998, 2005, 2006, 2009, 2012, Young)

Further, we must respectfully but passionately dispute the panel's holding that Special Agent Clelland properly concluded that Mr. Radseck did not keep cash in his home and that, therefore, there was no cash on hand to be reported on the exhibits. Such rationale fails to consider the untold thousands of taxpayers which maintain an investment portfolio of numerous saving accounts, brokerage accounts and sizable amounts of cash on hand. Any practicing attorney involved in probate matters understands the likelihood of there being a sizable amount of cash on hand in various estates. Certainly, our system of justice is not predicated upon determining the guilt or innocence of an accused upon such inaccurate and blatantly conclusionary evidence.

We maintain that the exhibits included such inaccuracies and conclusions that reversible error resulted. In support of our position, we cite *United States v. Dana*, 457 F. 2d 205 (7th Cir. 1972), *United States v. Scales*, 594 F. 2d 558 (6th Cir. 1979) and *United States v. Conlin*, 551 F. 2d 534 (2nd Cir. 1977) wherein it was held that even with instructions, a summary may still be considered as too inaccurate or conclusionary to be admitted in evidence.

III.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO CHARGE THAT THE GOVERNMENT MUST PROVE SPECIFIC INTENT TO DEFRAUD AS AN ESSENTIAL ELEMENT OF THE OFFENSE.

A long line of cases establishes beyond question that failure to charge an element of the offense is plain error requiring reversal even if the point was not raised below. In *United States v. Raub*, 177 F. 2d 312, 315 (7th Cir. 1949) the Court reversed a tax fraud conviction

for faulty instructions on intent to defraud, despite lack of objection, ruling that the question of fraud appears to be the essential issue in the case and such issue must be submitted to the jury under proper instructions.

In *United States v. Small*, 472 F. 2d 818, 820 (3rd Cir. 1972), the Court held that plain error was committed in the failure of the Court to instruct on all necessary elements of the crime of conspiracy. In *United States v. Meadows*, 598 F. 2d 984 (5th Cir. 1979), the Court reversed because the jury instructions at a critical juncture did not repeat language reminding the jury of the intent required to convict, despite the fact that a completely adequate definition occurred in the instructions only two sentences earlier. Finally, in *United States v. Williams*, 463 F. 2d 958, 1062 (D.C. Cir. 1972), the Court held that "any omission of an element of a crime in the instructions to the jury is plain error under Rule 52(b)."

Jury instructions in a mail fraud case should always specify that the government is required to prove that the defendant committed the alleged acts with the intent to defraud. In *United States v. Bryza*, 522 F. 2d 414, 426 (7th Cir. 1975, cert. denied, 426 U.S. 912 (1976)), this Circuit held that "the charge required a finding of specific intent to defraud as a prerequisite to a finding of guilt."

The Seventh Circuit Judicial Conference formulated and approved the following uniform jury instruction which clearly informs the jury of the specific intent to defraud element in the offense of mail fraud.

Section 16.01 Offense of Mail Fraud Defined Generally

The indictment charges the defendant with the crime of mail fraud. Before he may be found guilty of this crime the government must prove beyond a reasonable doubt that he participated in a scheme to defraud, *with the intent to defraud*, and that the mails were used in the furtherance of that scheme.

Section 16.02 Requisites of Scheme to Defraud

A scheme to defraud under the Mail Fraud statute means some plan to procure money or property by means of false pretense or representations calculated to deceive persons of ordinary prudence. *The Government must prove that defendant participated in such plan, and that such representations were made by him or his agents, knowing they were false, and with the intent to defraud.* 36 F.R.D. 457, 600-601.

By contrast, the trial court employed an instruction which was not in conformity with this Circuit's *La Buy* instructions. (Tr. Vol. 15, p. 2964-2969)

Specifically, the trial judge does not adequately instruct on the element of intent to defraud.

The trial judge's omission of essential language from the portion of the instructions in which he was describing the elements required to be proved cannot be cured by combining fragments of the concept from the indictment and other parts of the charge. As the Court stated in *United States v. Pope*, 561 F. 2d 663, 671 (6th Cir. 1977), "the failure to instruct on an essential element of the offense is fundamental error, which cannot be cured by reference to the indictment or by reading the unexplained language of the statute to the jury."

In Radseck's case, such a clear and concise instruction did not exist. The Court in *United States v. Brooksby*, 668 F. 2d 1102 (9th Cir. 1982) recognized the weakness of reconstituted instructions. The Court in this case reversed the conviction because an element of the offense was omitted from the instruction. We submit that the trial judge did not fully employ the approved *LaBuy* instructions. Since an essential element of the mail fraud offense has been omitted, the resulting conviction is fundamentally unfair.

CONCLUSION

For the reasons set forth above, this petition for hearing should be granted, and rehearing should be *in banc*. The panel's opinion should be vacated and Radseck's conviction reversed.

Respectfully submitted,

DANIEL E. NABKE

*Attorney for Appellant William O.
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Dated: October 11, 1983

APPENDIX C

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago, Illinois 60604

December 6, 1983.

Before

Hon. JESSE E. ESCHBACH, *Circuit Judge.*

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

No. 82-2390

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

WILLIAM O. RADSECK,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.

Nos. 82 CR 9, 81 CR 96

William O. Steckler, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

December 14, 1983

Before

Hon. JESSE E. ESCHBACH, *Circuit Judge*

Hon.

Hon.

No. 82-2390

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

WILLIAM O. RADSECK,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.

Nos. 82 CR 9 and 81 CR 96

Judge WILLIAM E. STECKLER

On consideration of the "MOTION FOR STAY OF
MANDATE" filed herein on December 12, 1983, by counsel
for the defendant-appellant,

IT IS ORDERED that said motion is hereby GRANT-
ED, to the extent that the mandate of this court is hereby
STAYED to and including January 13, 1984.

APPENDIX E

**CONSTITUTIONAL PROVISIONS
AND STATUTES**

U.S. CONST. AMEND. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of limb or life; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

U.S. CONST. AMEND VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FED. R. EVID. 801(d)(2)(E) in part:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if . . .

(2) Admission by party-opponent. The statement is offered against a party and is . . .

(E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

FED. R. EVID. 104(a) provides in part:

- (a) Question of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).
- (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

APPENDIX F

Bardach:

Would you tell us please what Mr. Hiner told you about Mr. Radseck?

Casassa:

He returned from the meeting to our office. He said that Mr. Radseck had plenty of work, would like to work with us. The arrangements of that deal would be that he would prefer to work mostly a one-on-one basis with Mr. Hiner, my partner, that he would give as much work as we could handle and that in turn for him giving us that work, he expected 15 percent of the total job's cost that we were paid in cash.

Bardach:

Did you and Mr. Hiner decide to do anything with respect to that proposal of Mr. Radseck's?

Casassa:

We discussed the proposal for about a half an hour in our office between us and we decided to do the work and go along with his terms. (Tr. Vol. 4, pp. 790, 791).